(2)

Supreme Court, U.S.
FILED
APR 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1462

In The
Supreme Court of the United States
October Term, 1987

TERRY ROGERS,

Appellant,

vs.

CITY OF CHEYENNE,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WYOMING

APPELLEE'S MOTION TO DISMISS

R. WALTER CONNELL
Attorney at Law
125 West Mendenhall
Bozeman, MT 59715
(406) 587-7496

DATE: April, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

20 pp

QUESTION PRESENTED

The question in this case is whether the City of Cheyenne Municipal Airport Zoning Ordinance, providing a height limitation in a non-instrument approach zone to the Cheyenne Municipal Airport, is a violation of the Fifth Amendment of the United States Constitution as a taking of private property for public use without just compensation.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cases and Other Authorities	iii
Motion to Dismiss	1
Statutory Provisions Involved	1
Statement	1
Argument:	
1. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION	3
2. THE PRINCIPLES OF *NOLAN v. CALIFORNIA COASTAL COMMISSION* DO NOT INVALIDATE THE HOLDING OF THE WYOMING SUPREME COURT	4
3. THE PRINCIPAL OF RES JUDICATA BARS CONSIDERATION OF THIS APPEAL	5
Conclusion	7
Appendix:	
Appendix A *Rogers v. City of Cheyenne* (D. Wyo. 1986)	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L. Ed. 2d 308 (1980) 5

Cheyenne Airport Board v. Rogers, 707 P.2d 717 (Wyo. 1985) 2, 4

Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84, 82 S.Ct. 531, 7 L. Ed. 2d 585 (1962) 3, 4

Nollan v. California Coastal Commission, — U.S. —, 107 S.Ct. 3141, 97 L. Ed. 2d 677 (1987) 4, 5

Penn Central Transportation Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed. 2d 631 (1978) 4

Rogers v. Cheyenne Airport Board, — U.S. —, 106 S.Ct. 1961, 90 L. Ed. 2d 647 (1986) 2, 5

Rogers v. City of Cheyenne, No. C86-0276-B (D. Wyo. Dec. 9, 1986) 2, 6

Rogers v. City of Cheyenne, 747 P.2d 1137 (Wyo 1987) 2, 5

United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L. Ed. 1206 (1946) 3, 4

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926) 4

STATUTE:

28 U.S.C. § 1257(2) 1

MOTION TO DISMISS

Pursuant to Rule 16.1, the Appellee, City of Cheyenne, moves to dismiss the appeal herein on the ground that the appeal does not present a substantial federal question, and on the ground that the principal of res judicata bars consideration of the appeal.

———o———

STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 United States Code Section 1257 provides that:

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

Other pertinent, constitutional and statutory provisions have been supplied to the court by the Appellant in his Jurisdictional Statement.

———o———

STATEMENT OF THE CASE

In 1974, the City of Cheyenne adopted a municipal airport zoning ordinance which restricted the height of

structures and trees within the zone. The purpose of the ordinance was to protect the citizens of Cheyenne and the flying public from dangerous obstructions in the flight approaches to the Cheyenne airport. After the enactment of the ordinance, the Appellant purchased residential property within the zone.

During July 1982, airport officials notified Appellant that a tree on his property was not in conformance with the airport zoning ordinance. Appellant refused to bring the tree into conformity and instead filed an action in state court alleging that the ordinance took an easement in his airspace without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The Wyoming Supreme Court upheld the constitutionality of the ordinance concluding that the ordinance did not effect an unconstitutional taking *Cheyenne Airport Board v. Rogers*, 707 P. 2d 717 (1985).

Appellant appealed that Wyoming Supreme Court decision. This court dismissed the appeal for want of a substantial federal question. *Rogers v. Cheyenne Airport Board*, — U.S. —, 106 S.Ct. 1961, 90 L. Ed. 2d 647 (1986). Appellant then filed an action in federal district court, under 42 U.S.C., 1983, seeking a declaratory judgment, injunction and damages. That case was dismissed as being barred by "[p]rinciples of full faith and credit, res judicata . . . . comity, equity and federalism." *Rogers v. City of Cheyenne*, No. C86-0276-B (D. Wyo. Dec. 9, 1986).

On June 18, 1986, the City of Cheyenne filed a criminal complaint against Appellant alleging a violation of the airport zoning ordinance by allowing a tree to grow into and remain in the restricted zone. Appellant was

convicted by the Municipal Court. Appellant appealed his conviction, by again challenging the constitutionality of the airport zoning ordinance. The Wyoming Supreme Court, in *Rogers v. City of Cheyenne*, 747 P. 2d 1137 (1987), for the second time, held that the airport zoning ordinance did not effect unconstitutional taking and further held that there was sufficient evidence that Appellant was under a duty to trim the tree to support his conviction.

Appellant brings this appeal once again, challenging the constitutionality of Cheyenne's airport zoning ordinance by alleging that the ordinance constitutes a taking without just compensation.

ARGUMENT

1. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Wyoming Supreme Court, for the second time, correctly applied standards and principles set forth by this Court. The Wyoming Court in this case, as in the prior appeal, relied on the decisions of this Court in the cases of *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) and *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) in determining that surface owners have no cause of action in trespass nor constitutional claim for uncompensated taking, unless the exercise of the flight easement by aircraft produces nuisance or some substantial impact on the surface. Further, the Wyoming Supreme Court in its prior decision determined that the dem-

onstrated purpose of the ordinance was for the promotion of the public's safety and general welfare and that the ordinance was in accord with substantive due process and the principles of the case of *Village of Euclid v. Ambler Realty Co.*, 365 U.S. 359 (1926), *Cheyenne Airport Board v. Rogers*, 707 P. 2d 717 (Wyo. 1985) at 727.

It should be noted that Appellant has never demonstrated in any action related to this appeal, evidence of substantial interference with or restriction of the use and enjoyment of the Appellant's property as a whole. The record does not contain any evidence of substantial impact on the surface of Appellant's property. The record does not contain evidence demonstrating any significant economic impact of the ordinance upon Appellant, nor does it demonstrate an interference with any investment backed opportunities of the Appellant. Therefore, the Wyoming Court properly upheld the height restrictions in accordance with the principles established by this Court in the cases of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), *Village of Euclid*, *Griggs* and *Causby*.

2. THE PRINCIPLES OF NOLLAN v. CALIFORNIA COASTAL COMMISSION DO NOT INVALIDATE THE HOLDING OF THE WYOMING SUPREME COURT

Appellant suggests that the recent decision of this Court in *Nollan v. California Coastal Commission*, — U.S. —, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), wherein this court held that the California Coastal Commission could not require a public easement across the surface of a landowner's beachfront property as a condition for a building

permit, invalidates the holding of the Wyoming Court below. However, the Wyoming Court considered the *Nollan* decision and properly noted that the *Nollan* holding and the basis for that holding were not applicable to the zoning ordinance in question. *Rogers v. City of Cheyenne,* 747 P. 2d 1137, 1139 (1987). The Wyoming Court in *Rogers* at 1139 also correctly pointed out that the airport zoning ordinance did not create or appropriate the easement for flight over Appellant's property, but instead was a regulation on actual and potential surface uses.

3. THE PRINCIPLE OF RES JUDICATA BARS CONSIDERATION OF THIS APPEAL

Appellant is seeking the same remedy from this Court as he sought in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986) supra. Appellant makes no new claims and he raises the same issues in this appeal that were raised in the prior appeal to this Court. In fact, the Appellant's arguments in his Jurisdictional Statement for this appeal are identical to the arguments which were made in the Jurisdictional Statement in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986). Because the remedy sought and the claims, issues and arguments are the same as in *Rogers v. Cheyenne Airport Board,* 90 L. Ed. 2d 64 (1986), wherein this court dismissed the appeal because of lack of a substantial federal question, this appeal should also be dismissed under the principle of res judicata. Res judicata precludes relitigation of claims and defenses that were raised or could have been raised in a prior proceeding. *Allen v. McCurry,* 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

When applying the principle of res judicata to Appellant's action for injunction and declaratory judgment concerning Cheyenne's airport zoning ordinance, Chief Judge Clarence Brimmer, of the United States District Court for Wyoming, aptly pointed out the need for application of res judicata when he stated:

> "This Court is the fourth in which defendants have been required to defend against plaintiff's claims. Considerable judicial time has been expended in this process. Plaintiff's received several bites at the apple, and it is time to end this litigation." *Rogers v. City of Cheyenne*, No. C86-0276-B (D. Wyo. Dec. 9, 1986)

Further judicial time by this Court should not be spent on this appeal and the principle of res judicata should be applied.

———o———

CONCLUSION

The decision of the Wyoming Supreme Court in this appeal was correct and based upon the proper application of settled principles of law articulated by this Court. No substantial federal question is present in this appeal and as a result, the appeal should be dismissed. The principle of res judicata also requires the dismissal of this appeal.

Respectfully submitted,

R. Walter Connell
Attorney for Appellee
City of Cheyenne
125 West Mendenhall
Bozeman, MT 59715
(406) 587-7496

DATE: April, 1988

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

TERRY ROGERS and BRENDA ROGERS,

Plaintiffs,

vs.

CITY OF CHEYENNE and
CHEYENNE AIRPORT BOARD,

Defendants.

ORDER GRANTING MOTION TO DISMISS

This matter came before the Court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and for costs and attorney fees pursuant to Fed. R. Civ. P. 11. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

This is an action for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983. Principles of full faith and credit, res judicata and of equity, comity and federalism bar this action. The Court consequently grants defendants' motion to dismiss.

The City of Cheyenne adopted a municipal airport zoning ordinance in 1974. The purpose of the ordinance is to eliminate dangerous obstructions near the airport's runways and flight approaches. To achieve this goal, the ordinance restricted the height of structures and trees within a specified zone. Plaintiffs purchased residential property within the zone two years after enactment of the ordinance. The City later demanded that the plaintiffs

comply with the zoning ordinance by trimming a large tree located on their property.

Plaintiffs filed an action in state court alleging that the ordinance took an easement in plaintiffs' airspace without just compensation in violation of the fifth and fourteenth amendments to the United States Constitution, as well as provisions of the Wyoming Constitution. Wyoming's Supreme Court upheld the constitutionality of the ordinance, holding that plaintiffs lost no compensable airspace. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 721 (Wyo. 1985), *appeal dismissed*, 90 L.Ed.2d 647 (1986). Plaintiffs appealed as of right to the United States Supreme Court. The Court dismissed for a want of a substantial federal question. *Rogers v. Cheyenne Airport Bd.*, 90 L.Ed.2d 647 (1986). Plaintiffs brought this action under 42 U.S.C. § 1983. They seek damages for alleged constitutional violations, an order enjoining enforcement of the ordinance, and a declaration that the ordinance unconstitutionally takes private property without just compensation.

Principles of full faith and credit, res judicata, and of comity, equity and federalism bar this case. Every court within the United States must give full faith and credit to judicial proceedings in other forums. 28 U.S.C. § 1738. The extent to which full faith and credit bars subsequent litigation depends on common law principles of res judicata. *Halvey v. Halvey*, 330 U.S. 610, 615 (1947). *See generally* Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamina-*

tion of the Full Faith and Credit and Due Process Clauses (Part 1), 14 Creighton L. Rev. 499 (1981). Res judicata precludes relitigation of claims and defenses that were raised or could have been raised in a prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Collateral estoppel makes a prior determination of an issue binding in a subsequent proceeding by precluding relitigation of issues actually decided in an earlier action. *Montana v. United States*, 440 U.S. 147, 153 (1979). These doctrines apply in § 1983 actions. *Allen v. McCurry*, 449 U.S. at 105 (collateral estoppel applies to § 1983 actions); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 85 (1984) (prior state court actions given res judicata effect in § 1983 actions). All of plaintiffs' claims in this action were raised or could have been raised in the state courts. The doctrine of res judicata therefore precludes plaintiffs' claims.

The doctrine's rationale supports this result. Res judicata is intended to relieve parties of the cost and vexation of multiple litigation, to conserve judicial resources, to avoid inconsistent judgments and to end litigation. *Montana v. United States*, 440 U.S. 147, 153-54 (1979). This Court is the fourth in which defendants have been required to defend against plaintiffs' claims. Considerable judicial time has been expended in this process. Plaintiffs received several bites at the apple, and it is time to end this litigation.

Plaintiffs argue that res judicata should not apply in this case. First, they contend that the state courts lacked subject matter jurisdiction over this claim. Second, they urge that the state courts denied them a full and fair

opportunity to litigate. The basis for each argument is a statement by the Wyoming Supreme Court noting that plaintiffs failed to seek a variance from the zoning ordinance. *See Cheyenne Airport Bd. v. Rogers*, 707 P.2d at 723, 732. Plaintiffs concede the accuracy of the court's statement but contend that their own failure to seek a variance deprived the state courts of jurisdiction and voided all proceedings in this case.

As authority they cite *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 87 L.Ed.2d 126 (1985) (plurality opinion). In that case, the Court concluded that a landowner's failure to seek a variance from a zoning ordinance and to utilize procedures for obtaining just compensation rendered the landowner's claim not ripe for judicial review. *Id.* at 138, 139. Plaintiffs argue that, because they failed to seek a variance from the zoning ordinance, the case was premature and the Wyoming courts lacked jurisdiction.

A closer examination of *Williamson* shows, however, that plaintiffs' reliance on that case is misplaced. First, *Williamson* is inapposite. That case was tried before a jury, which found that the landowner would be deprived of economic benefit from its land due to local land use regulations. The Court, however, reasoned that the failure to seek a variance showed that the decision of the local planning commission was not final. Therefore, the jury could not possibly find that the landowner had been denied the reasonable use of its property. *Id.* at 142, 143. In contrast, the Wyoming Supreme Court held that plaintiffs had not been deprived of a compensable property interest. *Cheyenne Airport Bd. v. Rogers*, 707 P.2d at 725.

Whether or not plaintiffs sought a variance is irrelevant to the determination that they possessed no property interest. Unlike *Williamson* this action presented a concrete case of final governmental action.

Second, Wyoming does not fully accept federal justiciability doctrines. *See* Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 *Land & Water L. Rev.* 527, 533-35 (1986). *Williamson* was tried in a federal court. Federal courts are courts of limited jurisdiction subject to the case or controversy limitations of Article III of the United States Constitution. Federal courts may only adjudge rights of litigants involved in actual controversies. *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). In contrast, state courts are not bound by the case or controversy requirements of Article III absent some analogous state constitutional provision. Instead of the enumerated cases or controversies of Article III, the Wyoming appellate and district are courts of general jurisdiction over all "causes both at law and in equity." Wyo. Const. art. 5, §§ 2, 10. Moreover, Wyoming's view of justiciability is broader than Article III. Wyoming, for example, excepts matters of sufficient public importance from the mootness doctrine. *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied sub. nom. Hot Springs County School Dist. No. One v. Washakie County School Dist. No. One*, 449 U.S. 824 (1980). *C.f. Defunis v. Odegaard*, 416 U.S. 312, 316 (1974) (federal mootness doctrine does not recognize a "public importance" exception). The Wyoming courts also have conferred taxpayer standing in

the face of contradictory federal precedent. *Springs v. Clark*, 14 P.2d 667, 668 (Wyo. 1932). *C.f. Frothingham v. Mellon*, 262 U.S. 447 (1923) (denying taxpayer standing). Finally, the Wyoming court has not used politically sensitive cases to read a political question doctrine into the state constitution. *See Brimmer v. Thomson*, 521 P.2d 574 (Wyo. 1978); *Washakie County School Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980), *cert. denied*, 449 U.S. 824 (1980). *C.f. Baker v. Carr*, 369 U.S. 186 (1962). For these reasons, the Court concludes that the Wyoming Supreme Court did possess jurisdiction and that its holding is entitled to full faith and credit.

Plaintiffs argue, however, that res judicata still cannot apply, because the state courts denied them a full year and fair opportunity to litigate. They assert that the Wyoming Supreme Court's observation that plaintiffs failed to seek a variance was not supported by any evidence in the record or raised in counsels' briefs or arguments. Plaintiffs contend that the Wyoming court's statement denied them due process of law. This argument is meritless.

First, the Wyoming Supreme Court's comment is harmless. Plaintiffs' counsel admitted the truth of the statement in oral argument before this Court. Plaintiffs are thus in the awkward position of contending that they were prejudiced by the truth. Moreover, the statement had an inconsequential effect on the outcome of the case. The Wyoming court simply did not rely on this fact in concluding that plaintiffs lost no compensable airspace.

Second, plaintiffs were not denied a full and fair opportunity to litigate. Res judicata may be inappropriate

where a party was denied a fully and fair opportunity to litigate in the state courts. *Allen v. McCurry*, 449 U.S. at 101; *Haring v. Prosise*, 462 U.S. 306, 313 (1983). The courts must consider whether state substantive law is facially invalid or whether state procedural law frustrates constitutional litigation. *Allen v. McCurry*, 449 U.S. at 100-101. Scholars point to several additional factors the courts should weigh. First, state issue and claim preclusion rules should apply if the § 1983 plaintiff initially selected a state forum. In such cases, giving res judicata effect to prior state court judgments does not frustrate the intent of § 1983. The second factor is whether relitigation in the federal courts undermines respect for state court judgments. Denying preclusive effect to earlier state court judgments may be appropriate where § 1983 litigation presents new claims or issues in the federal courts or where the federal constitutional issues were tangential to the state court proceedings. A third consideration is whether the state courts adequately and fairly considered the federal issues. Giving res judicata effect to a state court constitutional decision may be inappropriate if the state court had an institutional interest in the outcome of the litigation or if the §1983 litigation relates not to the issue originally in dispute but to the process by which the state court decision was reached. Fourth, claim preclusion is justified where the state court did not apply federal law to factual issues. Finally, preclusion may be appropriate where the remedy sought in federal court is substantially the same as that sought in the state courts. *See*, Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C. L. Rev. 59, 112-17 (1984); McCormack, *Federalism and Section 1983: Limitations on Judicial En-*

forcement of Constitutional Claims (Part II), 60 *Va. L. Rev.* 250, 276-77 (1974); Torke, *Res Judicata in Federal Civil Rights Actions Following State Litigation*, 9 *Ind. L. Rev.* 543, 561-68 (1976); Vestal, *State Court Judgment as Preclusive in Section 1983 Litigation in a Federal Court*, 27 *Okla. L. Rev.* 185, 187-211 (1974).

This is not a case of a party haled into court, forced to litigate constitutional claims against his will, or compelled without his consent to accept the state courts' determination of those claims. Plaintiffs chose to litigate in the state courts. They proceeded through each level of the Wyoming courts and to the United States Supreme Court. Their appeal to that Court was dismissed for want of a substantial federal question. Plaintiffs now urge this Court to declare those proceedings nugatory or to embark on its own appellate review of the Wyoming Supreme Court's decision. Plaintiffs are shopping for a new forum after losing in state court and before the United States Supreme Court. Claim preclusion is appropriate in these circumstances.

Other reasons justify applying res judicata. This Court would undermine the judgment of the Wyoming Supreme Court by providing, in effect, an appellate forum for plaintiffs' claims. New claims or issues are not presented by the § 1983 litigation. Nor were the federal constitutional issues tangential to the state court proceedings. Second, the state courts adequately and fairly considered the federal issues. They possessed no institutional interest in the outcome of the litigation. The instant litigation does not challenge the state court's decision-making process. It raises the same issues originally in dispute.

Third, the remedy sought in federal court is substantially the same as the remedy sought in the state courts.

Finally, principles of comity, equity and federalism require dismissal of this action. *See Younger v. Harris*, 401 U.S. 37, 43-44 (1971). The Constitution obligates the state courts to uphold federal law. *Allen v. McCurry*, 449 U.S. at 105. This Court has no reason to assume that they failed to do so in this case. The co-equal positions of the state and federal courts is "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). Comity and federalism indicate that the Court should abstain from deciding plaintiffs' claims. Equity dictates the same result. Plaintiffs acquired their property two years after the airport zoning ordinance was enacted. They therefore had ample notice of the ordinance and its effect on their property. Plaintiffs' tree may endanger air traffic. In the interest of public safety the Court must be guided by the policy of ending litigation.

Defendants also seek costs and attorney fees. They urge that plaintiffs' claim is groundless and unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law. This action, however, raises complex issues concerning the interaction between state and federal courts. These problems are not susceptible to ready determination, and the Court cannot find that the claim was totally unwarranted or interposed merely to harass. It is therefore

ORDERED that the defendants' motion to dismiss be, and the same hereby is, granted and all of plaintiffs'

claims against the City of Cheyenne and the Cheyenne Airport Board are hereby dismissed. It is further

ORDERED that defendants' motion for costs and attorney fees be, and the same hereby are, denied.

Dated this 9th day of December, 1986.

CLARENCE A. BRIMMER
CHIEF JUDGE,
UNITED STATES DISTRICT
COURT